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ALEXANDER L. STEVAS
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NO. 82-569

IN THE
SUPREME COURT OF THE UNITED STATES

_____, Term 19___

HENRY PEDERSEN and
ANN PEDERSEN, his wife,
Petitioners

vs.

SOUTH WILLIAMSPORT AREA
SCHOOL DISTRICT, ET AL.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS FOR

THE THIRD CIRCUIT

Clifford A. Rieders, Esquire
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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Circuit Court improperly affirmed a judgment in favor of Defendant School District where a jury found that a public employee with a property interest in his job knew of his right to a due process hearing but did not voluntarily and knowingly waive it?

2. Whether the Circuit Court erred in finding that a state statute required a due process hearing only when requested, when both state and federal law require that a terminated employee be given notice of his right to a hearing?

3. Whether the Circuit Court in *dicta* properly found that an arbitration hearing with respect to a collective bargaining agreement satisfied due process where the hearing and decision took place eight (8) months after the termination and there is no reason why the School Board could not have had a timely due process hearing?

4. Whether an arbitration procedure under a collective bargaining agreement can satisfy due process under the law as set forth in Barrentine vs. Arkansas-Best Freight System, Inc., 101 U.S. 1437 (1981)?

PARTIES IN THE PROCEEDING BELOW

The parties in the proceeding below were Henry Pedersen, the terminated employee, and Ann Pedersen, his wife, the latter having asserted a claim for loss of consortium, society and the like. Defendants, in the Court below, were the South Williamsport Area School District which employed Henry Pedersen, Edward A. Vollbrecht, the Superintendent of the School District, who terminated Mr. Pedersen, Robert G. Lesher, Vollbrecht's assistant, Fred Agnoni, Danny Reeser and George Michael. The latter three individuals allegedly conspired with the School District to have Henry Pedersen terminated.

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OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS DELIVERED IN THE COURTS BELOW

The District Court in an Order filed August 8, 1980, (12a-14a) denied a Motion to Dismiss and for a stay filed by Defendants indicating that exhaustion of state and union remedies were not required and that the Collective Bargaining Agreement did not cover procedures for termination. On December 19, 1980 (167a-175a) the District Court filed an Order denying Defendants' Motion for Partial Summary Judgment and finding eleven (11) facts to be without substantial controversy. The Court acknowledged that a state law granting Pedersen his property interest required a post-termination board hearing, but it did not regard the board as a necessary forum. The District Court stated that Pedersen was entitled to be informed of his right to a post-termination due process hearing unless he "knew of his right to demand a hearing." The Court also cast aspersion on a board hearing held for Mr.

Pedersen October 6, 1980 well after litigation was initiated by the District against Plaintiff for some minor criminal matters arising out of the termination and considerably after Plaintiff's civil rights action was pending against the District.

On January 26, 1981, (176a-186a) the District Court issued an Opinion and Order granting Defendants' Motion for Summary Judgment with respect to Count IV of the Complaint and also granting said Motion with respect to that portion of Count V which alleged intentional interference with contractual relations by the School District. In all other respects the Motion was denied. The Court reaffirmed that the School Board's contentions concerning the effect of the grievance proceeding under the union contract presented material issues of fact precluding an award of summary judgment.

On March 26, 1981, (187a-223a) the Court ruled with respect to motions by both parties

for reconsideration of prior orders as follows: Defendants' Motion for Summary Judgment with respect to Count I was granted to the extent that the only material facts in dispute "are the reasons for the delay in the arbitration hearing and whether Pedersen waived his right to a hearing before the Board of School Directors." The Court also granted Defendants' Motion for Summary Judgment with respect to Count III of the Complaint and with respect to Count V of the Complaint. In all other respects the Motions for Summary Judgment were denied. The Court reversed its view in the March 26, 1981 Opinion and held that the arbitration hearing held approximately nine (9) months after Pedersen was terminated might be sufficient to satisfy due process notwithstanding the state law creating Pedersen's property interest.

On May 4, 1981, the District Court ruled that the law of the case was altered by a U. S. Supreme Court decision.

Barrentine v. Arkansas-Best Freight System Inc., 101 U.S. 1437 (1981). The District Court opinion was supplemented by an Order of May 6, 1981. The Court denied Defendants' Motion for Summary Judgment and modified its opinion of March 26, 1981. (See attached) The Court found that because the union rather than Pedersen was responsible for processing the grievance and because the union did not have the same interest in the arbitration as did Mr. Pedersen, the arbitration proceeding, even if timely and properly conducted, was not sufficient to provide Plaintiff with the process to which he was entitled. On May 18, 1981, (see attached) the Court dismissed the case based upon a jury verdict which found that although Plaintiff knew of his right to a hearing he did not voluntarily waive a due process hearing.

In an Opinion filed April 30, 1982, the United States Circuit Court for the Third

Circuit affirmed the District Court. (See attached). A petition for rehearing or rehearing en banc was mailed May 13, 1982. The Circuit Court in an Order dated June 9, 1982 denied the Petition, per Weis, Judge. (See attached)

The statutory provision conferring jurisdiction on this Court to review the judgment in question by Writ of Certiorari can be found at 28 U.S.C. §1254(1). The time limit for the appeal is found at 28 U.S.C. §2101(c) See also Supreme Court Rule 20(4) dealing with Petitions for Rehearing.

JURISDICTION OF THE SUPREME COURT

Date of the judgment or decree sought to be reviewed and the time of its entry.

The Circuit Court on June 17, 1982, certified as a true copy a judgment affirming the lower court and issued same in lieu of a formal mandate. The Circuit Court denied a Petition for Rehearing on June 9, 1982. See Appendix.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS WHICH THE CASE INVOLVES

1. U. S. Constitution, Fourteenth Amendment

> * * * no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. Amendment XIV, §1, U.S.C.

2. Pennsylvania School Code

> The Board of School Directors in any school district, except as herein otherwise provided, shall, after due notice, giving the reasons therefore, and after hearing if demanded, have the right at any time to remove any of its officers, employees or appointees for incompetency, intemperance, neglect of duty, violation of any of the school laws in this Commonwealth or other improper conduct. 24 P.S. §5-514.

3. Civil Rights Act

> Every person who, under color of any statute, ordinance, regulation, custom or usage or any State or Territory... subjects, or causes to be subjected, any citizen

of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit, inequity, or other proper proceeding for redress. * * *

4. Pennsylvania Administrative Procedure Act

No adjudication of a local agency shall be valid as to any party unless he shall have been afforded reasonable notice of a hearing and an opportunity to be heard. * * * 2 Pa.C.S.A. §553.

STATEMENT OF THE CASE

The basis for federal jurisdiction in the Court of first instance is 28 U.S.C. §1343 because the action was predicated upon 42 U.S.C. §1983.

The facts material to consideration of the questions presented are as follows:

1. In a letter dated November 9, 1979 Pedersen was notified that effective immediately he was suspended for five (5) work days without pay. The notification stated that the District intended to discharge Pedersen. The employee was informed that his discharge would be subject to review by the School Board and that a hearing on the charges would be held before the Superintendent the following week. The letter was signed by Robert G. Lesher, Assistant to the Superintendent before whom the hearing was to be held. (16a).

2. In a letter dated November 12, 1979 Pedersen was informed of the pre-termination

hearing to be held before Superintendent Vollbrecht and a list of several charges followed. (17a-18a).

3. The Superintendent conducted the pre-termination hearing based on the charges written by his subordinate and asked Mr. Lesher for a recommendation on behalf of the School District. (19a-20a).

4. Mr. Lesher recommended termination and after a recess for deliberation the Superintendent stated "my decision is that Mr. Pedersen be terminated from the School District effective November 19, 1979, the end of the suspension period. This decision will be presented to the Board of Education, in executive session." (20a).

5. In a letter dated November 20, 1979 Pedersen was informed by Vollbrecht that he was dismissed from his job although the letter contained no recitations of fact or conclusions of law. (21a).

6. The Administrator, Robert Lesher, who presented the charges against Pedersen

and made a recommendation at the Superintendent's pre-termination hearing serves at the "desire" of Dr. Vollbrecht. (25a). Lesher believes that the superintendent controls his job. (26a). Prior to the pre-termination hearing the Superintendent met with Pedersen's co-workers who were to be the chief witnesses against him and with Robert Lesher to discuss the evidence. (29a-31a). Dr. Vollbrecht even went so far as to ask Pedersen's chief accuser if he would testify against Pedersen. (33a). At an executive session the Board of Directors of the School District were given the facts by Vollbrecht and voted to terminate Pedersen. (44a-45a).

7. After the federal complaint was filed the School District filed criminal charges against Pedersen and held a Board hearing in October of 1980. (49a-52a). The Board, before its hearing in October, was fully aware of the complaint, had discussed

it and had discussed defenses with defense counsel. (52a-53a).

8. The Board was involved with the criminal charges and learned what the various witnesses said at different hearings prior to the hearing which the Board gave Pedersen in October of 1980. (54a-58a).

9. The refusal of the District Judge to dismiss the case or stay same upon the School District's request was the reason for the October 1980 Board hearing. (59a-60a).

10. At the Board hearing it was up to Pedersen to "convince the Board that the Administrators presented the wrong facts". (60a).

11. It was admitted that the School Board itself must give some kind of hearing. (67a). The Superintendent acknowledged that if he was in the position of a Board member in October, having heard all the facts from the administration point of view as the Board had done, he would have been biased. The Administrator stated that the Board had

essentially heard all the facts. (69a-70a).

12. Henry Pedersen filed a grievance and the arbitration was held in July of 1980. The Complaint was filed on April 15, 1980 and the discharge took place in November of 1979. (78a-91a).

13. The District Court found that the parties were in agreement that under state law Pedersen could not be terminated absent good cause and that it was the Board of Directors of the School District which had the authority to terminate him. (168a).

14. On the waiver issue, Pedersen testified that since the School Board hired him he was "under the impression that they can fire me." (242a). He believed that he should be able to "get up and speak and say my piece in front of the Board." (242a-243a). Pedersen testified that on previous occasions he attempted to speak before the Board at public sessions but he was told that he could

not speak about personnel matters at that time and should sit down. (252a-253a).

15. Pedersen stated that at the Superintendent's pre-termination hearing a Union representative showed up but he did not inform Pedersen of his rights and "[h]e was there just from the Union." (262a-263a). The Union representative told Pedersen that he could go to arbitration but he told him nothing else. (267a). The Union representative did not tell Pedersen anything about his rights and the discussions between Pedersen and the Union representative were "just about whether they were going to handle the grievance or not." (280a).

16. Pedersen talked to one of the Board members, Mr. Nolan, about a School Board hearing and the official responded that "he did not know what was going on up there anyway." (290a-291a). Nolan was a school director at the time of the relevant proceedings. Pedersen testified that he did not know he had to request a Board hearing.

(294a). The maintenance employee understood that he had a right to "speak to the School Board" but he obviously did not understand the pre-requisite of a formal hearing. (294a).

17. Pedersen had ten (10) years of education in England but presently is a citizen of the United States. Pedersen did not know of his right to a "formal" hearing before the School Board. (314a-316a). Aside from his representation in the present case Pedersen was never notified of the requirements of the law. (316a-318a).

18. A few weeks before the firing Mr. Caldera, President of the School Board at the time, refused to permit Pedersen to speak at a public meeting concerning problems on the job (331a) but Caldera never told Pedersen at any time that he had a right to a hearing by the entire Board sitting as an impartial fact finder. (332a).

19. John Hatfield, a Union

representative, told Pedersen that he did not think a School Board hearing would be worthwhile. (360a). Hatfield never explained the nature of the hearing before the School Board and the requirements thereof. (360a-361a).

20. The Court ruled on points for charge granting Pedersen's 1 through 4, 7 and supplemental 1. (See attached). It covered Pedersen's 13.1, 14 and 15. (See attached).

21. The jury was charged that Mr. Pedersen could not waive his right to a Board hearing to which he was entitled unless he knowingly, voluntarily and intelligently waived that right. (426a).

22. The jury was informed that state and federal law requires that Pedersen be informed of his right to demand a hearing and that the employee should not be expected to investigate Title 24 of Purdon's Statutes to determine whether he has a right to a hearing. (427a).

23. The jury unanimously found that in

November of 1979 Henry Pedersen knew that he had the right to ask for an impartial hearing before the Board of Directors of the South Williamsport Area School District concerning his termination but in response to the second question the jury found that Pedersen did not voluntarily give up his right to such a hearing by the Board of Directors. (See attached).

24. The trial continued on the question of good faith of the individual defendants and whether Pedersen would have been dismissed if he had been given a due process hearing in a timely fashion by the Board. The Court granted a mistrial and entered judgment for defendant on the special verdict questions.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

It is the position of Pedersen that the Circuit Court clearly doparted from precedent in the field of procedural due process.

There is no disagreement that Pedersen was entitled to a timely due process hearing. Pennsylvania School Law defines the hearing which is due. 28 P.S. §5-514. There can be no disagreement that the pre-termination hearing held by the Superintendent and the Board hearing of October 6, 1980 were not appropriate due process hearings. The first "hearing" was prior to termination and was given by the Superintendent after consultation with witnesses and the prosecuting officer. The Board hearing in October of 1980, as found by the District Court, was not timely and was given by a Board hopelessly prejudiced by virtue of the fact that the District was a defendant in a civil rights case, that the Board had authorized criminal action against Pedersen,

and perhaps most importantly because it was stated by George Girio (President of the Board at the time) that the specific reason for the Board hearing was to moot the federal case.

Defendants claimed, pursuant to District Court invitation, that Pedersen knew of his right to a due process hearing, did not ask for a hearing before the Board and therefore waived it. The State law requiring notice of a hearing has been established for many years in the Commonwealth of Pennsylvania and is consistent with federal court cases. Swartley v. Norristown Area School District, 414 A.2d 153 (Cmwlth.Ct.1980) relying upon Hetkowski v. Dickson City School District, 141 Pa.Super. 526, 15 A.2d 470 (1940) which in turn relied upon Swink's Case, 132 Pa.Super. 107, 200 A. 200 (1938).

Federal authority is in accord. Memphis Light, Gas & Water Division v. Craft, 436 U.S.1, 98 S.Ct. 1554 (1978), Bishop v. Wood, 426 U.S. 341, 96 S.Ct. 2074

(1976) and Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701 (1972). These three cases focused on the availability of a local and municipal law remedy as evidence of the State's recognition of a protected interest.

> The purpose of notice under the Due Process Clause is to apprise the affected individual of, and permit adequate preparation for, an impending "hearing". At 98 S.Ct. 1563 (footnote omitted).

In footnote 15 the Court stressed that individuals "should be informed clearly of the availability of an opportunity to present their complaint" id. (emphasis added).

It becomes obvious that a person cannot waive a right unless it exists and he knows about it. It is the position of Pedersen that the School District was required to inform him of the hearing available and the nature of same. The School District, of course, did not do this. A hearing must be held at a meaningful time and in a meaningful manner in order to satisfy due process and

notify the party to be effected of his rights. Armstrong v. Manzo, 380 U.S. 545, 85 S.Ct. 1187 (1965).

The District Court followed Supreme Court authority with respect to waiver of a Constitutional right but then ignored the cases in entering judgment for defendant. D. H. Overmeyer Co. v. Frick, 405 U.S. 1867, 92 S.Ct. 775 (1972) and Brookhard v. Janis, 384 U.S. 1, 86 S.Ct. 1245 (1966) are controlling. The District Court was required to prove any waiver of federal law by "clear and positive" proof. The burden on the School District is "heavy". Perhaps most important, a waiver must be intelligent and knowing, meaning that a person must understand the nature of the right before he can give it up. Notice of a person's due process cannot be "a mere gesture...." Parratt v. Taylor, 101 S.Ct. 1908, 1914 (1981) citing Mullane v. Central Hanover Trust Co., 339 U.S. 396 70 S.Ct. 652 (1950).

The jury obviously believed that although Pedersen knew of his right to a hearing in a general sense there was no "clear and positive" proof that Pedersen knowingly and intelligently waived the procedure. The testimony indicated that it was not explained to Pedersen that he could have a hearing before the Board with the right to counsel, cross-examination of witnesses and followed by findings of fact and conclusions of law. The fact that a person realizes that he should have a fair or an impartial hearing and even talks to a school director about speaking "his piece" does not mean that he understands the nature of or the procedures available at such a hearing and that he specifically, intentionally and knowingly wishes to give it up. The School District offered no evidence either directly or by cross-examination indicating that Henry Pedersen knew the type of hearing available and that he knowingly

intended to give up his right.

The District and Circuit Court ignored the fact that Pedersen did not knowingly and voluntarily give up his right to a due process hearing and entered judgment in favor of the School District because the statute creating Pedersen's property interest says that he is entitled to a hearing "if demanded". The Circuit Court and the District Court, however, ignored absolutely unequivocal state and federal law on the subject in so doing.

In dicta the Circuit Court found that an arbitration hearing with respect to a collective bargaining agreement satisfied due process. The hearing took place eight (8) months after the termination and was not held pursuant to the state law creating Pedersen's property interest. The Circuit Court decided the issue "[i]n view of the importance of the matter, and its recurring nature...." The Circuit Court also said: "there is no dispute that a post-termination proceeding

would be proper in the circumstances and should have been held within a reasonable time."

The Circuit Court never addressed whether the arbitration in the instant case was within a reasonable time. The District Court relied upon the decision in Barrentine v. Arkansas-Best Freight System, Inc., 101 U.S. 1437 (1981) to find that the labor arbitration could not suffice for a due process hearing under the circumstances because of the difference in the nature of the two proceedings. The Circuit Court disagreed. The Circuit Court also believed that to apply Barrentine would require holding the Pennsylvania Public Employee Relations Act unconstitutional. It is the position of Pedersen that the Circuit Court was incorrect since a due process hearing was a procedure to be afforded a dismissed public employee with a property interest regardless of what other remedy may be contracted for

between a public employee and the employer.

We assert that Pedersen was entitled to a Board hearing by virtue of the statute creating his property interest and that the arbitration was not sufficient because of its untimeliness, because it was not an attempt at a due process hearing, because it constituted the Union arguing on behalf of an ex-employee as against current employees and because it could not grant the full measure of relief. Concerning the importance of a rapid arbitration procedure see United Parcel Service Inc. v. Mitchell 101 S.Ct. 1559 (1981).

The statute creating the property interest required a hearing by the School Board. There is Supreme Court authority for the proposition that the forum designated by a statute creating a property interest must be utilized. The plurality opinion in Arnett v. Kennedy, 416 U.S. 134, 94 S.Ct. 1633 (1974) held that "the very section of the statute which granted him that right [a

property interest in employment],... expressly provided also for the procedure by which 'cause' was to be determined...." at 416 U.S. 153, 94 S.Ct. 1643. The Opinion was announced by Mr. Justice Rehnquist which was joined in by the Chief Justice and Mr. Justice Stewart. Justices Powell and Blackmun who concurred in part, disagreed with the notion that the legislation creating the property interest could also define the procedural due process which must be afforded an individual upon a deprivation of his property interest. It should be noted that the Opinion of the two Justices who formed the plurality was based upon the fact that the legislation creating the property interest deprived a person of adequate procedural due process.

While the Legislature may elect not to confer a property interest in federal employment, it may not constitutionally authorize a deprivation of such an interest

once conferred, without appropriate procedural safeguards. At 416 U.S. 168, 94 S.Ct. 1650.

The reasoning of Justice Powell does not indicate that the statute creating a property interest cannot also define the forum which has the authority to cut off an individual's employment rights. Pedersen's position is buttressed by Justice Powell's statement that the terminated employee "is entitled to an opportunity to appear personally before the official having the authority to make or recommend the final decision.*** After removal, the employee receives a full evidentiary hearing and is awarded back pay if reinstated". 416 U.S. 171, 94 S.Ct. 1652. Arnett merely said that a pre-termination hearing was not required but the plurality was forged by three Justices who believe that the statute granting the property interest also controls the procedural due process and by one Justice who approved of a post-termination procedure which guaranteed a

decision by those in the equivalent position to the South Williamsport Area School Board. Mr. Justice White was the fifth Justice who made the Arnett Opinion possible and he disapproved of regulations which diluted the due process which had to be given upon termination of a property interest.

In the event that Arnett does not compel a hearing by the Board staff, we rely upon Barrentine. Arbitration was not recognized as being adequate in Barrentine for the following reason:

> Disputes arising under a collective bargaining agreement are processed by the employee's union rather than by the individual employee. The union's interest, and rightly so, is to maximize the benefits under the collective bargaining agreement to all employees rather than necessarily to strive to vindicate the rights of an individual member in a particular grievance. Given that obligation, a union may without breaching its duty of fair representation fail adequately to protect the employee's interest. (226a).

As the District Court noted Pedersen's

"right to maintain his job unless grounds for his removal are shown is an individual right and enforceable even if the circumstances were such that the Union could determine that his removal would not be inimical to the interests of other employees and might be beneficial to them." (226a). See also (229a) and (230a).

If the property interest created by §5-514 of the Pennsylvania School Code required a Board hearing as argued by Pedersen there is no need to address the arbitration matter. However if labor arbitration can be a viable alternative to procedural due process the question of timeliness and similarity of interest under Barrentine must be examined.

In Corrigan v. Donilon, 639 F.2d 834 (1st.Cir. 1980) appellants had been wrongfully terminated but were not required to undergo a hearing before the school board as ordered by the District Court. The Court noted that had appellants "been afforded a prompt hearing before the school board" there

would have been no due process violation. The board was required to follow state procedures even though a federal due process claim was at issue. At 837.

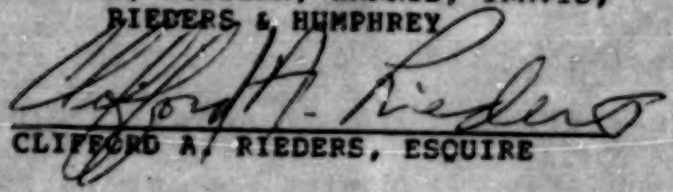
CONCLUSION

The jury found that Pedersen knew of his right to an impartial hearing but did not voluntarily and knowingly waive that right. The District Court entered judgment for Defendant because the state statute granting Pedersen his property interest said that he was entitled to a School Board hearing "if demanded". Although all applicable federal and state authority require notice of the opportunity of a hearing to the employee and in spite of a jury finding that the employee did not knowingly and voluntarily waive his right to a hearing defendants prevailed.

In a decision with far reaching implications the Circuit Court found that labor arbitration can suffice for a due

process hearing even when the arbitration was not intended as a due process hearing, was not performed by those in a position to hire and fire, was untimely, was not designated under the statute creating the property interest, and did not have the same interests at stake which would be involved in a proper due process hearing. We belive this was error and should be reviewed by the Supreme Court.

MURPHY, MUSSINA, HARRIS, TRAVIS, RIEDERS & HUMPHREY



CLIFFORD A. RIEDERS, ESQUIRE

CERTIFICATE OF SERVICE

AND NOW comes Clifford A. Rieders, Esquire, Attorney for Petitioners, and certifies that the within Petition for Writ of Certiorari was filed with the United States Supreme Court, One First Street, N.E., Washington, D. C. 20543, this 29th day of September, 1982, by first class mail.

He further certifies that a copy was served upon John Bonner, Esquire, 329 Market Street, Williamsport, PA 17701, this 29th day of September, 1982 by first class mail, postage prepaid.

MURPHY, MUSSINA, HARRIS, TRAVIS, RIEDERS & HUMPHREY

Clifford A. Rieders, Esquire

SWORN to and subscribed before me this 29 day of Sept., 1982.

Deborah A. Dougherty
Notary Public

My Commission Expires:

DEBORAH A. DOUGHERTY, Notary Public
Williamsport, Lycoming Co., Pa.
My Commission Expires January 10, 1983

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

HENRY PEDERSEN, et al.: CIVIL NO. 80-0404

Plaintiff : Complaint filed 4/15/80

vs. : JUDGE MUIR

SOUTH WILLIAMSPORT AREA SCHOOL DISTRICT, :

Defendants :

ORDER
May 4, 1981

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

On April 3, 1981, the Defendants moved for summary judgment on counts 1, 2, 6 and 7, the only counts remaining in this action, and supported the motion with documentary evidence and a brief filed the same day. The Plaintiffs filed a brief in opposition to the motion on April 16, 1981. The Defendants have chosen not to file a reply brief. Because of the decision in the case of Barrentine vs. Arkansas-Best Freight System, Inc., ___ U.S. ___, 49 U.S.L.W. 4347, announced on April 6, 1981, the Court concludes that the Defendants are not entitled to summary judgment as to Count 1 and that Mr. Pedersen's arbitration rights under his collective

bargaining agreement are irrelevant to that count. In addition, the Court will deny the Defendants' motion for summary judgment as to Counts 2, 6 and 7.

In its opinion of December 19, 1980, the Court held that Pedersen's procedural due process rights could be satisfied either by a hearing before the school board as contemplated by section 514 of the Public School Code of 1949, 24 P.S., section 5-514, or by a timely arbitration proceeding under the collective bargaining agreement. The Court adhered to this position in its opinion of March 26, 1981. This determination by the Court was based on its conclusion that an arbitration proceeding before an impartial arbitrator would provide Pedersen with the procedural due process rights to which he was entitled. Pedersen vs. South Williamsport Area School District, Civil No. 80-404, slip op. at 21 (M.D. Pa. March 26, 1981). Based on the Supreme Court's subsequent decision in Barrentine vs. Arkansas-Best Freight System, Inc., ___ U.S. ___, 49 U.S.L.W. 4347 (April 6, 1981), the Court now concludes that its determination on this point must be modified.

The question faced by the Supreme Court in Barrentine was whether an employee could maintain an action alleging a violation of the minimum wage provisions of the Fair Labor Standards Act, 20 U.S.C., section 201 et seq., after he had unsuccessfully submitted a wage claim based on the same underlying facts to a grievance procedure under his union's collective bargaining agreement. The Supreme Court held that he could maintain the action. In so holding, the Court emphasized the difference between contractual dispute resolution procedures and individual ones in a way that is applicable to this case.

Disputes arising under a collective bargaining agreement are processed by the employee's union rather than by the individual employee. The union's interest, and rightly so, is to maximize the benefits under the collective bargaining agreement to all employees rather than necessarily to strive to vindicate the rights of an individual mumber in a particular grievance. Given that obligation, a union may without breaching its duty of fair representation fail adequately to protect the

employee's interests. Barrentine vs. Arkansas-Best Freight System, Inc., ___ U.S. ___, ___, 49 U.S.L.W. 4347, 4351 (April 6, 1981).

Similar considerations are at play in this case. Pedersen had the right not to be deprived of his job without due process. A major aspect of his procedural right was his right to a hearing at which he could dispute the reasons for his firing. An essential element of that right is that the party advocating Mr. Pedersen's position owe allegiance only to him. This is because Mr. Pedersen's right to maintain his job unless grounds for his removal are shown is an individual right and enforceable even if the circumstances were such that the union could determine that his removal would not be inimical to the interests of other employees and might be beneficial to them. Since it is undisputed in this case that the union, rather than Mr. Pedersen, was responsible for the processing of the grievance and because the union did not have the same interest in the arbitration as did Mr. Pedersen, the arbitration proceeding, even if timely and properly

conducted was not sufficient to provide Mr. Pedersen with the process to which he was entitled.

Chung vs. Park. 514 F.2d 382 (3d Cir. 1975), is not inconsistent with this result but is supportive of it. While it is true that in Chung the Court of Appeals held that an arbitration proceeding was sufficient to vindicate the employee's due process rights, that arbitration proceeding differed in at least two material respects from the one afforded Pedersen. First, the decision to submit the dispute to arbitration was arrived at by agreement between the attorney general's office and counsel representing the employee. Second, the employee was represented at the arbitration hearing by counsel of his choice. In Chung, therefore, the employee was represented by an advocate who was concerned with the employee's interest. Such was not the case in Pedersen's arbitration.

It is undisputed that Mr. Pedersen did not receive a hearing before the Board until October 6, 1980. In its opinion of March 26,

1981, the Court held that that hearing had occurred too late as a matter of law to discharge the Defendants' obligation under the due process clause. There does exist, as the Court indicated in its prior opinions, an issue of material fact as to whether Mr. Pedersen knew of his right to a hearing and waived that right. For this reason, summary judgment may not be awarded to either party on Count 1.

Count 2 of the complaint attacks the substantive reasons for Pedersen's firing and alleges that he was fired for reasons violative of his First Amendment rights of expression and association. Although it is a close question, the Court concludes that issues of material fact exist as to the reason for Pedersen's firing.

The Defendants seek summary judgment on Counts 6 and 7 only on the basis that those counts may not stand if both counts 1 and 2 are dismissed. Since the Court concludes that neither party is entitled to summary judgment on Counts 1 and 2, the Court may not grant summary judgment on Counts 6 and 7 on the

basis of the Defendants' arguments.

NOW, THEREFORE, IT IS ORDERED THAT:

1. The Defendants' motion for summary judgment with respect to Counts 1, 2, 6 and 7 is denied.

2. The only material facts in dispute with respect to liability under Count 1 are those relating to the question of whether Pedersen waived his right to a hearing before the board of school directors.

3. Paragraph 2 of the Court's order of March 26, 1981 is vacated.

MUIR, U.S. District Judge

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

HENRY PEDERSEN, et al.,	:	CIVIL NO. 80-0404
Plaintiffs	:	JUDGE MUIR
vs.	:	
SOUTH WILLIAMSPORT AREA SCHOOL DISTRICT, et al.,	:	
Defendants	:	

ORDER
May 6, 1981

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

On May 4, 1981, the Court issued an order in the above-captioned case that held that contractual remedies available to Pedersen to attack his discharge are irrelevant to his claim that he was discharged without due process of law. That order incorrectly stated that the Defendants have not filed a reply brief when in fact such a brief had been filed on April 24, 1981. The purpose of this order is to amend the Court's order of May 4, 1981 in order to discuss the issues raised in the Defendants' reply brief.

NOW, THEREFORE, IT IS ORDERED THAT:

1. The Court's order of May 4, 1981 is amended by inserting the following on page 4 before the first full paragraph in that page:

"In their reply brief, the Defendants seek to distinguish Barrentine on the ground that Barrentine involved substantive rather than procedural rights. The Court recognizes that such was the case; however, the Supreme Court's discussion concerning the lack of a complete identity of interest between the individual employee and his union are equally are at issue.

"Board of Education vs. Philadelphia Federation of Teachers, 464 Pa. 92 (1975), relied on by the Defendants, and by the Court in its opinion of March 26, 1981, did not involve a case in which the employee sought to invoke his right to a hearing before the School Board and is for that reason not applicable in light of Barrentine. West Middlesex Area School District vs. Commonwealth, ___ Pa. Cmwlth., ___, 423 A.2d 781 (1980), also relied on by the Defendants, held that an unsuccessful hearing before the board did not preclude resort to arbitration by the employee. The issue in this case is not whether Pedersen could, if he chose to, pursue arbitration but whether he was entitled to a hearing before the board regardless of arbitration. West Middlesex is not relevant to that determination and if relevant it appears to give the employee the right to both forums at least as a matter of state law."

2. Page 1, paragraph 1 of the Court's order of May 4, 1981 is amended by deleting the third sentence and inserting the following:

"The Defendants filed a reply brief on

April 24, 1981."

MUIR, U.S. District Judge

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

HENRY PEDERSEN, et al.,	:	CIVIL NO. 80-0404
Plaintiffs	:	Complaint filed 4/15/80
vs.	:	
SOUTH WILLIAMSPORT AREA SCHOOL DISTRICT, et al.,	:	JUDGE MUIR
Defendants	:	

ORDER
May 18, 1981

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

On May 12, 1981 the jury found in answer to special verdict question #1 that in November 1979 Henry Pedersen knew that he had a right to ask for an impartial hearing before the Board of Directors of the South Williamsport Area School District concerning his termination. The jury also found that Mr. Pedersen did not voluntarily give up his right to such a hearing. On the basis of these answers, the Defendants moved for judgment in their favor. The Court declined to direct the entry of judgment at that time because it was of the view that it

would be more efficient to try the remaining issues in this case so that if the case were appealed and the Court of Appeals disagrees with this Court's legal determination, it could remand the case for the entry of the appropriate judgment based on the facts as found by the jury. The Court did, however, dismiss the case against the individual Defendants. On May 15, 1981, almost at the end of the rebuttal testimony on the issue then being tried as to whether the School Board would have discharged Pedersen had a hearing been held before the Board in November 1979, the Court granted the Defendant South Williamsport Area School District's motion for a mistrial. In light of this circumstance, the Court is of the view that rather than commence the trial again on the remaining issue or issues, it would be appropriate to enter judgment on the special verdict questions in favor of the Defendants.

Throughout this case, the Plaintiffs have argued that Mr. Pedersen's right to a hearing is governed by section 514 of the Pennsylvania School Code, 24 P.S., section 5-514. That section provides:

> The board of school directors in any school district . . . shall after due notice, giving the reasons therefor, and after hearing if demanded, have the right at any time to remove any of its officers, employes or appointees for incompetency, intemperance, neglect of duty, violation of any of the school laws of this Commonwealth or other improper conduct.

Section 514 does not impose on the board an obligation to provide a hearing unless one is demanded by the employee. It is the Court's view that this procedure complies with the Fourteenth Amendment's requirement as regards to due process. The Court has previously held that Mr. Pedersen was entitled to notice of his right to demand a hearing unless he knew of that right. The jury found that Mr. Pedersen knew of his right to ask for a school board hearing. It is undisputed that Mr. Pedersen did not request such a hearing. On this basis, the Court concludes that the Defendants are entitled to judgment in their favor.

The Court acknowledges that in prior opinions it has expressed the view that an additional question was one of voluntary waiver of a right to a hearing. This issue was

submitted to the jury with the approval of both parties. It is the Court's present view that as a matter of law the issue of a voluntary waiver is not a proper part of this case. Mr. Pedersen's right to a hearing before the board of school directors was not an absolute one which could only be waived by a knowing and intelligent waiver. His right to a hearing was conditioned on his having demanded one, provided, of course, that he had knowledge of that right. For example, had Mr. Pedersen been given proper notice of his right to demand a hearing and lost the letter or forgot to request the hearing, then there would be no due process violation on the ground of the board's failure to provide him with one. Similarly, since the jury has found that Mr. Pedersen knew of his right to ask for a hearing, his failure to ask for one, for whatever reasons, discharged the board of any obligation to provide one. This being the case all Defendants are entitled to judgment in their favor.

Prior to trial, the Plaintiffs abandoned

their claim that Mr. Pedersen was discharged for reasons violative of his First Amendment rights. In light of the Court's conclusion that Mr. Pedersen's due process rights were not violated, his and Ann Pedersen's claims for intentional infliction of emotional distress are subject to dismissal as well.

NOW, THEREFORE, IT IS ORDERED THAT:

The Clerk of Court shall prepare a form of judgment for the Court's approval in favor of the Defendants dismissing the Plaintiffs' complaint.

_____

MUIR, U.S. District Judge

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

HENRY PEDERSEN, et al.,	:	CIVIL NO. 80-0404
Plaintiffs	:	Complaint filed 4/15/80
vs.	:	JUDGE MUIR
SOUTH WILLIAMSPORT AREA SCHOOL DISTRICT, et al.,	:	
Defendants	:	

JUDGMENT

This action came on for trial before the Court and a jury, Honorable Malcolm Muir, United States District Court Judge, presiding, and the issues having been duly tried and the jury having duly rendered its Special Verdict,

It is Ordered and Adjudged

That the Plaintiffs take nothing, that the action be dismissed on the merits, and that the Defendants South Williamsport Area School District, et al., recover of the plaintiffs Henry Pedersen, et al, their costs of action.

Dated at Williamsport, Pennsylvania, this 18th day of May, 1981.

Donald R. Berry, Clerk of Court

by _____
Deputy Clerk

Approved:

_____
MUIR, U.S. District Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 81-2093 and 81-2094

HENRY PEDERSEN and ANN PEDERSEN, his wife
Appellants in 81-2093

v.

SOUTH WILLIAMSPORT AREA SCHOOL DISTRICT,
EDWARD A. VOLLBRECHT, ROBERT G. LESHER,
FRED AGNONI, DANNY REESER
and GEORGE MICHAL,

South Williamsport Area School District,
Appellants in 81-2094

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Argued March 4, 1982

Before: HUNTER, WEIS and HIGGINBOTHAM,
Circuit Judges

Opinion filed April 30, 1982

Clifford A. Rieders, Esquire
(ARGUED)
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Williamsport Area
School District

OPINION OF THE COURT

WEIS, Circuit Judge.

A discharged school district employee claims a denial of due process because he was not advised of his right to a hearing before the School Board. The district court found that the employee knew of this right and, therefore, could not recover damages simply because he lacked formal notice. We agree and also hold that a timely arbitration under the collective bargaining agreement in effect at the time of the discharge was a valid alternative to a Board hearing and satisfies due process requirements.

Plaintiff Pedersen's suit for damages against South Williamsport Area School District, its Board members and several employees, challenged his discharge on a variety of state and federal grounds, including defamation,

abuse of process, breach of contract and lack of due process. The complaint alleged liability under 42 U.S.C., section 1983 and contained pendent state law claims as well. Most of the counts were dismissed before trial and the case was tried to a jury in the district court on the question of procedural due process. Based on the jury's answer to a special interrogatory that Pedersen knew of his right to a hearing, the district court entered judgment for the defendants.

Pedersen had been a maintenance employee of the School District for several years when, in November of 1979, it charged him with theft, unauthorized use of school property, insubordination and other derelictions. He was given notice of his alleged misconduct and was represented by a union official at a hearing before the School Superintendent on November 15, 1979. The Superintendent recommended Pedersen's discharge and, in an executive session on November 19, 1979, the Board voted to terminate his services.

Pedersen did not request a hearing before

the Board. Instead, he requested his union, the American Federation of State, County and Municipal Employees, to grieve his discharge and ask for reinstatement. The procedures in the collective bargaining agreement were followed through to arbitration under the auspices of the American Arbitration Association. The arbitrator returned a finding against Pedersen in July of 1980.

In April of 1980, before the arbitration had been completed, Pedersen filed this suit in the United States Court for the Middle District of Pennsylvania. Thereafter, in October of 1980, the Board held a hearing on Pedersen's discharge and reaffirmed its earlier action.

In winnowing out the various claims, the district court granted summary judgment for the defendants in some instances and dismissed other counts. At one point, the court believed that the grievance procedure did satisfy due process, but that the plaintiff should nevertheless be given the opportunity to present evidence on the reason the arbitration hearing was not held until July 1980. Henry Pedersen

vs. South Williamsport Area School District, No. 80-0404 (M.D. Pa. March 26, 1981). After the Supreme Court filed its opinion in Barrentine vs. Arkansas-Best Freight System, Inc., 450 U.S. 728 (1981), however, the district court reconsidered its position and concluded that the arbitration proceeding, even if timely, did not meet due process requirements. Henry Pedersen vs. South Williamsport Area School District, No. 80-0404 (M.D. Pa. May 4, 1981).

The case then proceeded to the liability stage of a bifurcated trial. The jury determined, by its answer to special interrogatories, that Pedersen knew about the statute entitling him to ask for a hearing before the School Board, but that he did not voluntarily give up that right. During the damages phase of the trial, a mistrial was granted on an evidentiary matter. The court then entered judgment for the defendants, finding that Pedersen did not ask for a hearing and, therefore, the Board was not required to conduct one. Since Pedersen was aware of his statutory rights, the court held, the Board had no

obligation to give him formal notice.

Pedersen appeals the due process issue, contending that the court erred in disregarding the jury's finding that he did not voluntarily waive his hearing before the Board. He also challenges the court's declaration of a mistrial. The School Board cross-appeals the district court ruling that arbitration did not fulfill the requirements for due process.

The parties agree that Pedersen's employment by the School District was a property interest which could not be taken from him without due process. The pertinent provision of the Pennsylvania School Code provides:

> "The Board of School Directors in any school district . . . shall, after due notice, giving the reasons therefore, and after hearing if demanded, have the right at any time to remove any of its . . . employees . . . for incompetency, intemperance, neglect of duty, violation of any of the school laws . . . or other improper conduct."

PA. STAT. ANN. Tit. 24, section 5-514 (Purdon 1962). Pedersen had a pre-termination hearing before the Superintendent and at that time was advised of the charges against him. He also had notice that the Superintendent was

recommending dismissal. It is therefore only the third requirement - a hearing before the Board - that plaintiff contends was denied him and for which he seeks recompense.

Implicit in the district court's decision, and not contested by the plaintiff, is that the statutory provision for a hearing before the Board meets federal due process standards.[1] We agree with the district court that Pedersen was not entitled to damages simply because there had not been a hearing before the School Board. The statute is clear on its face that a hearing must be demanded by the employee before the Board is under an obligation to provide one.

[1]The district court also found that the hearing held by the School Board in October of 1980, six months after this suit was commenced, was untimely and tainted by the fact that the members were defendants in this civil rights proceeding. Further, one of the Board members had preferred criminal charges against Pedersen. We need not discuss these issues in view of our disposition of the case, nor do we decide whether a hearing to "moot-out" the lawsuit is ineffective to satisfy the claim of due process denial. Cf. Carey vs. Piphus, 435 U.S. 247 (1978); Wilson vs. Taylor, 658 F.2d 1021, 1031-34 (5th Cir. 1981); DiLuigi vs. Kafkalas, 584 F.2d 22, 27 n. 7 (3rd Cir. 1978), cert. denied, 440 U.S. 959 (1979).

There is ample support for the jury's finding that Pedersen was aware of his right to present his case to the Board. Testimony established that his union representative advised him that he had a right to such a hearing, and his attorney did likewise. Pedersen chose instead to file a grievance and utilize the procedure set out in the collective bargaining agreement. In these circumstances, to hold that the Board is liable for damages because it did not give Pedersen formal notice of what he already knew would be indefensible.

The jury's finding that Pedersen did not voluntarily waive his right to appear before the Board is puzzling and we agree with the district court that the finding is irrelevant. There is nothing to suggest that the Board in any way inhibited Pedersen from requesting a hearing. Since Plaintiff did not establish an evidentiary basis for liability against the Board or its members, we will affirm the judgment of the district court.

We differ, however, with the district court's conclusion that the arbitration

proceedings did not provide due process to plaintiff. In view of the importance of the matter, and its recurring nature, we believe it appropriate to discuss the issue. We have had the benefit of briefing and argument by the parties on the point.

A few years after the Pennsylvania School Code came into effect, the legislature enacted the Pennsylvania Public Employee Relations Act (PERA) PA. STAT. ANN. tit. 43, section 1101. 201 et seq. (Purdon 1981). This statute permits collective bargaining between public agencies and their employees and provides that "[a]rbitration of disputes or grievances arising out of the interpretation of the provisions of a collective bargaining agreement is mandatory." Id. at section 1101.903. The Pennsylvania Supreme Court has construed this statute, together with the School Code's hearing provision, in Board of Education vs. Philadelphia Federation of Teachers, 464 Pa. 92, 346 A.2d 35 (1975). In that case, the court held that section 5-514 of the School Code does not preclude a school district from arbitrating grievances arising out

of the discharge of a non-tenured teacher. Justice Roberts wrote, "The General Assembly, far from forbidding arbitration of disputes arising out of a collective bargaining agreement, expressly commands it in section 903 of the PERA . . ." 346 A.2d at 39. The court pointed out that, because of the possibility of bias on the part of the school board, arbitration offers employees the advantage of a more impartial adjudicator.

In the context of a discharge dispute, the state court interpreted "just cause" under the collective bargaining agreement as being either co-extensive with the statutory grounds or, if less restrictive, as acceptable to the employee in exchange for the procedural advantages of arbitration. In either event, arbitration is not an impermissible infringement on the Board's responsibility and powers.

In Pittsburgh Joint Collective Bargaining Committee vs. Pittsburgh, 481 Pa. 66, 391 A.2d 1318 (1978), the court again approved arbitration as a means of promoting "harmonious relationships between the public employer and

employee." 391 A.2d 1322. Indeed, the court emphasized that grievance arbitration "is even more supportive of a favorable employment climate where [it] arises from the good faith bargaining of the parties rather than being required by statute." Id. State law, therefore, establishes that arbitration in cases similar to the one at hand is the preferred method of resolution.

The plaintiff, however, while relying upon state law to establish his property right, looks to federal law to define procedural due process. In Logan vs. Zimmerman Brush Co., ___ U.S. ___, 50 U.S.L.W. 4247 (Feb. 24, 1982) the United States Supreme Court observed that while a state may have specified procedures that it deems adequate, minimum due process standards are a matter of federal law. If a hearing is required, its timing and nature will depend on an appropriate accommodation of competing interests, including the importance of the private concern, the finality of deprivation, and the likelihood of governmental error. See Mathews vs. Eldridge, 424 U.S. 319 (1976).

Since all of these factors are implicated here, some type of hearing is unquestionably required. There is no dispute that a post-termination proceeding would be proper in the circumstances and should have been held within a reasonable time. What is at issue is whether arbitration meets constitutional minimum requirements. In this connection, the Supreme Court in Logan said that what the Fourteenth Amendment does require is an opportunity granted at a meaningful time and in a meaningful manner for a hearing appropriate to the nature of the case. Logan vs. Zimmerman Brush Co., 50 U.S.L.W. at 4251.

As the district court's opinion of March 26, 1981, points out, proceedings before the impartial arbitrator enabled Pendersen to confront and cross-examine the witnesses against him, as well as offer evidence on his own behalf. In addition, the arbitrator submitted a written report, giving his conclusions and the supporting evidence. Although Pedersen later complained that he received short notice of the hearing date, the union representative

failed to request a postponement, and his lawyer was unable to attend, plaintiff did not contend that any of these alleged deficiencies were caused by the defendants.

Except for the unexplained delay in scheduling the arbitration hearing, the court would have granted summary judgment at that time on the due process issue. As the court reasoned, either the remedy of a hearing before the Board as provided by section 5-514, or the arbitrator's hearing, sufficed to meet Fourteenth Amendment standards.

In view of Barrentine, however, the district judge reconsidered his decision. Barrentine held that an employee, whose overtime payment grievance was denied in a collective bargaining arbitration proceeding, was nevertheless free to bring suit on the same facts in federal court under the Fair Labor Standards Act. The Court said that the substantive rights granted employees under the Act were not waivable, could not be abridged by a collective bargaining agreement, and were intended by Congress to be brought in court. Moreover, because of the

technical nature of the statute, non-lawyer arbitrators might not be competent to decide the legal questions presented in such disputes. Finally, the court noted that a union representing an individual might be required, out of interest for its membership at large, to sacrifice the individual's rights under the statute.

The considerations underlying Barrentine are substantially different than those present in the case at bar. Here the rights at stake are procedural, not substantive.[2] They are waivable and there is no Congressional policy requiring state employment controversies to be resolved in a judicial forum. The issues in a discharge dispute are neither technical nor complex and are resolved in numerous arbitration cases annually.

Although employees in private industry are not entitled to Fourteenth Amendment due process rights, it is noteworthy that most of the

[2]We discuss only the procedural phases of Barrentine because its res judicata aspects are not pertinent here.

discharges by companies where unions represent employees are resolved by arbitration. Indeed, it is the expressed national policy to encourage extra-judicial remedies in controversies of that nature. See Steelworkers vs. Warrior & Gulf Co., 363 U.S. 574 (1960).

Pennsylvania has adopted arbitration as its preferred dispute resolution method for governmental subdivisions and their employees. To apply Barrentine's holding to this case would require us to declare the Pennsylvania Public Employee Relations Act unconstitutional. Although we are not bound by a state's provisions on due process, we should not lightly override a policy adopted by its legislature and approved by its supreme court. The test is not whether the federal court could design a better scheme, but whether the state's procedures cross the threshold of minimum guarantees. Rennie vs. Klein, 653 F.2d 836 (3d Cir.) (in banc), cert. pending ___ U.S. ___ (1981)(No. 81-5534).

The district court was concerned that one of the Barrentine considerations - that the

union might sacrifice the interest of an individual member for that of the group - could also affect arbitration under PERA. Such a conflict is not present here, and we are not convinced that the remote chance that one might exist at some time is enough to make the Pennsylvania procedure unconstitutional. If a claimant feels that his interests might be jeopardized by conflicting union obligations, he can choose a Board hearing instead of arbitration.

Possible internal union conflict was only one of the many factors listed in Barrentine, and it is noteworthy that this potential weakness has not prevented arbitration from gaining widespread acceptance in private industry. From the standpoint of the employee, a job is equally important whether the employer is a governmental entity or otherwise, and the loss is equally serious. The widespread use of arbitration in the private sector furnishes some idea of what many people regard as a fair method of resolving a dispute. Essentially, fundamental fairness is what due process means.

Mullane vs. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

We are convinced that the district court's initial impression was correct and that it later gave an interpretation to Barrentine not intended by the Supreme Court. As we read that opinion, the Court excluded arbitration only when a narrow class of specific substantive rights were at stake. Those circumstances are not present here and we are persuaded that arbitration under PERA satisfies procedural due process.

Accordingly, the judgment of the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 81-2093/4

PEDERSEN, HENRY and PEDERSEN, ANN, his wife,
Appellants in No. 81-2093

vs.

SOUTH WILLIAMSPORT AREA SCHOOL DISTRICT;
VOLLBRECHT, EDWARD A.; LESHER, ROBERT G.;
AGNONI, FRED; RESSER, DANNY; MICHAEL, GEORGE

SOUTH WILLIAMSPORT AREA SCHOOL DISTRICT,
Appellants in No. 81-2094

(D.C. Civil No. 80-0404)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Present: HUNTER, WEIS and HIGGINBOTHAM,
Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued by counsel on March 4, 1982.

On considerations whereof, it is now here ordered and adjudged by this Court that the orders of the said District Court, entered May 4, 6 and 18, 1981 be, and the same are hereby

affirmed. Costs taxed against appellant(s) in each case.

ATTEST:

Chief Deputy Clerk

April 30, 1982

Certified as a true copy and issued in lieu of a formal mandate on June 17,

Test:

Chief Deputy Clerk, United States Court of Appeals for the Third Circuit

Costs taxed in favor of appellee in No. 81-2093. South Williamsport Area School District as follows:

Appendix.....	$337.00
Brief.....	80.55
TOTAL	$417.55

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 81-2093/4

HENRY PEDERSEN and ANN PEDERSEN, his wife,
Appellants in 81-2093

vs.

SOUTH WILLIAMSPORT AREA SCHOOL DISTRICT, et al.
Appellants in 81-2094

SUR PETITION FOR REHEARING

Present: SEITZ, Chief Judge, ALDISERT, ADAMS, HUNTER, WEIS, HIGGINBOTHAN and BECKER, Circuit Judges.*

The petition for rehearing filed by

HENRY PEDERSEN and ANN PEDERSEN, his wife,
Appellants in 81-2093

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

*Honorable Leonard I. Garth and Honorable Dolores K. Sloviter did not participate in the consideration of this matter.

By the Court,

_____
Judge

Dated: June 9, 1982

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 81-2094

PEDERSEN, Henry and PEDERSEN, Ann, his wife

vs.

SOUTH WILLIAMSPORT AREA SCHOOL DISTRICT; VOLLBRECHT, Edward A.; LESHER, Robert G.; AGNONI, Fred; RESSER, Danny; MICHAEL, George

South Williamsport Area School District,

Appellant

Present: HUNTER, WEIS and HIGGINBOTHAM, Circuit Judges.

O R D E R

It is ORDERED that the judgment in this case be amended to read, "Each party shall bear its own costs."

It is FURTHER ORDERED that the provision as to costs in No. 81-2093 shall not be affected.

BY THE COURT,

Circuit Judge

Dated: June 9, 1982

POINT FOR CHARGE NO. 1

Mr. Pedersen's complaint in this case claims that the actions of the South Williamsport Area School District in terminating Mr. Pedersen deprived him of his right to property, which was his right to work, without due process of law in violation of the Fourteenth Amendment to the United States Constitution. When the Government acts to take away a property right, it must give notice and an opportunity to be heard after the termination.

(Form used in Ross vs. Pennsylvania State University and Ryan vs. Mansfield State College.

POINT FOR CHARGE NO. 2

In various pre-trial proceedings in this case the Court has made rulings which have substantially limited the scope of the trial.

"Pedersen had the right not to be deprived of his job without due process. A major aspect of his procedural right was his right to a hearing at which he could dispute the reasons for his firing."

(Pedersen vs. South Williamsport Area School District, et al., No. 80-0404, slip opinion filed May 4, 1981.)

POINT FOR CHARGE NO. 3

In this case there was no timely due process hearing before the Board of Directors of the South Williamsport Area School District.

(Pedersen vs. South Williamsport Area School District, et al., No. 80-0404, slip opinion filed October 6, 1980 and May 4, 1981)

POINT FOR CHARGE NO. 4

There are different ways in which a hearing can be set up for a person who has job tenure such as Mr. Pedersen but in this case there is a specific Pennsylvania state law on the subject.

"The Board of School Directors in any School District . . . shall after due notice, giving the reasons therefore, and after hearing . . . have the right at any time to remove any of its . . . employees . . . for incompetency, intemperance, neglect of duty, violation of any of the school laws of this Commonwealth, or other improper conduct."

(Pedersen vs. South Williamsport Area School District, et al., No. 80-0404, slip opinions May 4, 1981 and May 6, 1981; Ross vs. Pennsylvania State University and 24 P.S., section 5-514; Simineo vs. School District No. 16, 594 F.2d 1353 (10th Cir. 1979).

POINT FOR CHARGE NO. 7

The issue you are trying at this time is whether Mr. Pedersen waived his right to a hearing.

"State law required the Board to notify Pedersen of his right to demand a hearing. *** More important, however, is that such notice is required as a matter of federal law. *** . . . an employee in Mr. Pedersen's position should not be expected to investigate Title IV of Purdon Statutes to determine if he has a right to a hearing." The Court has decided previously in this case that Mr. Pedersen did not receive notice "reasonably calculated 'to inform Pedersen of his right to a hearing.'"

Such notice was not necessary, however, if Pedersen knew of his right to demand a hearing.

(Pedersen vs. South Williamsport Area School District, et al., No. 80-0404, slip opinion filed December 19, 1980; Swartley vs. Norristown Area School District, ___ Pa. Cmwlth. ___, 414 A.2d 153 (1980; Memphis

Light, Gas & Water Div. vs. Craft, 436 U.S. 1, 15 (1978).

SUPPLEMENTAL POINT FOR CHARGE NO. 1

There was testimony in this case related to a termination and reinstatement of Mr. Pedersen in 1975, to an arbitration proceeding which began when Mr. Pedersen was terminated in November of 1979 and to some kind of proceeding before Dr. Vollbrecht on November 15, 1979. You are not to consider those matters in your deliberations. The only question before you is whether Mr. Pedersen was aware of his right to a School Board hearing and knowingly, voluntarily and intelligently waived that right. There has been no evidence in this case that anything which occurred during 1975, at Dr. Vollbrecht's meeting or during the arbitration would have informed Mr. Pedersen of his rights to a Board hearing and likewise nothing happened at those proceedings to indicate that Mr. Pedersen waived his rights.

POINT FOR CHARGE NO. 13.1
ALTERNATIVE FOR PREVIOUS POINT FOR CHARGE

You can find that Mr. Pedersen waived his right to a hearing but only upon certain specified conditions. There is a strong presumption against the waiver of a constitutional right, and waiver must be shown by "clear and positive" proof. The party claiming waiver has a "heavy burden" to rebut the presumption against waivers. Waivers will not be found in circumstances which fall short of being "clear and compelling". Furthermore, a waiver must be intelligent and knowing. Only a known right or privilege may be waived. There must be an intentional relinquishment of a known right or privilege and the Courts have been consistently unwilling to infer a waiver of a right not clearly spelled out at the time of the alleged waiver. In other words a person cannot waive a right to a hearing unless he knew of his right to demand the particular kind of hearing available. A right cannot be waived before it is known to exist.

The facts and circumstances of each case are to be considered, to include the background, experience and conduct of the party alleged to have waived his right.

(Pedersen vs. South Williamsport Area School District, et al., slip opinion filed April 15, 1980; Brookhart vs. Janis, 384 U.S. 1.)

POINT FOR CHARGE NO. 14

To reiterate there can be no waiver of a constitutional right unless it "be voluntary, knowing and intelligently made, *** or 'an intentional relinquishment or abandonment of a known right or privilege.'" The Courts "do not presume acquiescence in the loss of fundamental rights . . . ."

(D. H. Overmayer Company vs. Frick, supra, at 405 U.S. 186-187, 92 S. Ct. 782).

POINT FOR CHARGE NO. 15

Defendant must prove by a preponderance of the evidence that Mr. Pedersen knew of his right to an impartial hearing such as I described to you and that he waived his right to a School Board hearing. If you find that Defendants did not carry their burden then you cannot find waiver.

(See Points for Charge Nos. 4-12).

1. In November 1979 did Henry Pedersen know that he had the right to ask for an impartial hearing before the Board of Directors of the South Williamsport Area School District concerning his termination?

Answer: Yes X

No_____

(Check One)

Each juror who agrees sign here:

Theodore R. Toot	Janice L. Walton
Henry M. Bartlett	Edward D. Collins
Marian B. Bender	Madeline B. Smith
Beverly M. Smith	Victor J. Montefusco
Robert P. Friese	J. Harold Clark

INSTRUCTIONS:

(a) The burden of proof is on Defendant South Williamsport Area School District to prove a "yes" answer.

(b) If the answer to this question is yes, go to the next question.

(c) If the answer to this question is no, return to Court.

2. If your answer to the previous question is yes, did Henry Pedersen voluntarily give up his right to such a hearing by the Board of Directors of the South Williamsport Area School District?

Answer: Yes_____
No X
(Check One)

Each juror who agrees sign here:

Theodore R. Toot	Janice L. Walton
Henry M. Bartlett	Edward D. Collins
Marian B. Bender	Madeline B. Smith
Beverly M. Smith	Victor J. Montefusco
Robert P. Friese	J. Harold Clark

INSTRUCTIONS:

(a) The burden of proof is on Defendant South Williamsport Area School District to prove a "yes" answer.

(b) After answering this question, return to Court.